Supreme Court, U.S.
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No. 02-1096

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

THE ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by this case are:

1. Whether the Kentucky Supreme Court committed constitutional error in upholding the trial court's decision not to instruct the jury on the impermissibility of extraterritorial punishment, in light of the facts that: (a) even after Ford ignored the trial court's repeated warnings not to "open the door" to discussions of nationwide data and extraterritorial conduct, and questioned its own witnesses about such matters, Respondents made only *de minimus* references to Ford's out-of-state conduct, and only after being invited and provoked to do so; (b) the testimony presented and arguments made by Respondents were far removed from *State Farm Mut. Auto Ins. Co. v. Campbell*, (No. 01-1289), where, as part of the plaintiffs' affirmative case, they focused days of testimony, and the bulk of their argument to the jury, on State Farm's out-of-state conduct; (c) Ford thought Respondents' evidence was so diaphanous that it moved for a direct verdict on that ground at the close of Respondents' case on punitive damages, arguing that "they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award"; (d) unlike the Utah Supreme Court's decision in *Campbell*, the court below did not base its award of punitive damages against Ford on the basis of Ford's nationwide or exterritorial conduct, and, indeed, never mentioned such; and (e) pursuant to the "invited error"doctrine, *United States v. Wells*, 519 U.S. 482, 488 (1997), Ford is estopped from seeking plenary review of the error it provoked.

2. Whether the Kentucky Supreme Court committed constitutional error in upholding the trial court's decision not to specifically instruct the jury that the purposes of punitive damages are to "punish and deter," in light of the facts that: (a) as this Court explained in *Pacific Mut. Life Ins. Co. v. Haslip*, "[a]s long as the [jury's] discretion is

exercised within reasonable constraints, due process is satisfied," 499 U.S. 1, 20 (1991); (b) the trial court gave the jury detailed statutory-based instructions that were not only anything but "threadbare" but were far more exacting and coherent that the ones upheld in *Haslip*; (c) the trial court's errors, if any, were harmless because Respondents' counsel admonished the jury six times that the purposes of punitive damages are to punish and deter, and Ford's counsel was given equal and ample opportunity to do the same; and (d) the trial court's errors, if any, should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court, which well appreciated the limited legitimate purposes of punitive damages.

3. Whether the Kentucky Supreme Court committed constitutional error in upholding a remitted $15 million punitive damage award—and a mere five-to-one ratio of punitive to compensatory damages—in light of the facts that: (a) that court determined that there was sufficient evidence to support the jury's finding that Ford's misconduct was "intentional" and "malicious" and thus "substantial[ly]" "reprehensib[le]"; (b) the five-to-one ratio of punitive to compensatory damages is well below ratios upheld by this Court before *BMW* and well below ratios routinely upheld by federal and state appellate courts since *BMW*, especially in cases involving human injury and death; (c) Ford's faulty design and its post-design conduct qualified as "aggravating factors" that the *BMW* Court identified as especially meriting punitive damage awards, *i.e.*, (1) Ford's faulty design and its "malicious" conduct had a substantial "effect on [its product's] performance or safety features," *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 576 (1996); (2) Ford had acted not only with "indifference to or reckless disregard for the health and safety of others," but proven "intentional malice," *id.*; and (3) where the harm was not "purely economic in nature" but involved death, *id.*; (d) Ford had ample notice that it faced a substantial

punitive damages award in this case because: (1) the award was comparable to the punitive damages upheld against Ford fifteen years earlier in a case involving an identically designed defective transmission; (2) the award was comparable to penalties imposed on Ford in other cases involving dangerously defective products; (3) Ford was required to pay nearly as much in what were essentially punitive damages for another defective product that caused deaths in Kentucky just one year before Tommy Smith was killed; and (4) Ford's conduct constituted manslaughter, which exposed it to forfeiture and revocation of its corporate charter and not just civil fines.

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BRIEF FOR RESPONDENTS IN OPPOSITION
STATEMENT OF THE CASE

Tommy Smith, a 30-year-old husband and father, was "slowly crushed to death," 2a, when Petitioner Ford Motor Co.'s defectively designed 1977 Ford F-250 pickup truck spontaneously shifted into reverse. Mr. Smith worked for the Sand Hill Energy Co., a Kentucky mining company. On September 2, 1993, his supervisor told him to use the pickup truck to move bags of ammonium nitrate from a storage trailer to the mine-pit. 2a.; Respondents' Appendix ("RA") 1. After unloading the bags, Mr. Smith pulled the truck four feet away from the trailer, shifted it into park, and, leaving engine running to complete a short-term task, went behind the truck to shut the trailer's doors. 2a; RA-3-4. While he was doing so, the truck's C-6 model transmission, designed, manufactured, and marketed by Ford, suddenly and spontaneously "migrated" from park into powered reverse. The truck moved so quickly that Mr. Smith was unable to jump out of the way. It moved so powerfully—backwards, up a hill—that Mr. Smith was unable wrestle free. 2a; RA-3-4. Some time later, Mr. Smith's supervisor noticed the truck was stationary but "quivering," went to investigate, and discovered him trapped behind the truck. RA-3-4. After the supervisor moved the truck forward, he found Mr. Smith was "gurgling" for air but unable to speak. *Id.* He was rushed to a local hospital, where he died later the same day. *Id.*

Mr. Smith's widow filed a wrongful death suit in the Clay County Circuit Court, 41st Judicial Circuit of Kentucky, on behalf of Mr. Smith's Estate, herself, and their eight-year-old daughter. They claimed that Ford was strictly liable for the C-6 transmission's design defects and negligent for both those defects and for Ford's post-design, post-production, post-sale conduct—primarily for its failure to warn foreseeable users of C-6-equipped vehicles of its design defects and the unreasonable risks those defects caused, as well as for Ford's failure to recall and retrofit

essential improvements to C-6 equipped vehicles to prevent the kind of accident that killed Tommy Smith.

Contrary to Ford's representations, the evidence adduced was neither "'speculati[ve]'" nor insufficient. Pet. 3-5 & 24 (quoting, Pet. 3, n.1, two unpublished cases). Respondents relied upon expert testimony from Mel Richardson, who had earned a Ph.D. in mechanical engineering and had taught Machine Design for twenty years as a full professor of engineering at Clemson University. He had also conducted an extensive study of C-6 transmissions since 1981, 14a, and had served as a Ford consultant and witness.[1] Richardson testified that C-6 transmissions had a literally fatal design flaw, one that lured a driver into mistakenly thinking that a C-6-equipped vehicle was safely in park when it was not, and a tendency for engine vibration to cause the transmission to spontaneously "migrate" from an "illusory" or "false Park" to powered reverse, which, in turn, caused the vehicle to jump backwards, just as it did in this case. 2a. Richardson explained that his proposed alternative design had been validated by Ford itself, which, in 1980, had redesigned the C-6 along the lines he had recommended. 3a, 8a-9a; 10a-11a. Respondents also relied on memos from Ford's engineers to further "establish the existence of a design flaw and that Ford had knowledge of it long before the vehicle involved here was manufactured," 3a, *i.e.*, critical elements for liability for both compensatory and punitive

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[1] *Clay v. Ford Motor Co.*, 215 F.3d 663, 668 (6th Cir.), *cert. denied*, 531 U.S. 1044 (2000). While Ford cites two unpublished cases to undermine Richardson's methodologies as "speculative" and unreliable, it has failed to inform the Court that Richardson's testimony has recently been admitted credited in seven federal and state cases. *See Clay*, 215 F.3d at 669; *Griego v. Ford Motor Co.*, No. 96-00087-CV-4, at 4 (11th Cir. April 13, 2001)(*per curiam*); *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1217 (11th Cir. 1999); *Thornton v. Caterpillar, Inc.*, 951 F.Supp. 575, 576 (D.S.C. 1997); *Greco v. Ford Motor Co.*, 937 F.Supp.810, 816 (S.D.Ind. 1996); *Gentry v. Toyota Motor Corp.*, 471 S.E.2d 485, 487 (Va. 1996); *Gen'l Tire, Inc.*, 917 S.W.2d 444, 449 (Tex.App.).

damages. Richardson further testified that "the underlying defect was unaffected by the age and repair condition of the vehicle." 10a.

The jury found the Respondents' evidence credible and Respondents' arguments more persuasive, specifically finding, *inter alia*, the following facts: (A) the C-6 transmission in the F-250 truck was "defectively designed"; 66a; (B) the C-6 transmission in the F-250 truck was, for all intents and purposes, "in its original, unaltered, and unmodified condition," 66a; (C) "the defective and unreasonably dangerous condition of the truck was [the only] substantial factor in causing the accident and death of Tommy Smith," and Ford was "100%" at "fault." 66a, 70a. Thus the Respondents were awarded $3 million in compensatory damages, "100%" payable by Ford. 70a-71a.

During the punitive damages phase of the bifurcated trial, additional evidence was presented showing that Ford first became substantially aware of numerous accidents caused by C-6 transmissions, and the product's highly dangerous features, as early as 1970, when the company "began receiving complaints concerning incidents." 13a. By 1971, Ford's own "engineers [started] articulating problems with the C-6 transmission and disclosing numerous customer complaints." 14a. RA-14-15. By 1972, Ford's "Principal Engineer" for "Safety Systems" was circulating a memo, RA-18, to management that was "extraordinary in its description of the [C-6] flaw": "'design permits . . . possibility of vehicle vibration moving the lever from park to reverse in an unattended vehicle,'" because even when the "'[s]hift lever-spring [is] loaded against insert plate in improper position [it] appears to customer as proper,'" a phenomenon that "is occurring frequently in the field with actual high accident incidence.'" He then 'recommend[ed] that forward design and development be directed toward a feasible alternative which positively positions shift lever in park or reverse, to prevent a false sense of security as to transmission position.'" 14a & n.24. RA-18. Thus, "[t]here

is no doubt that for at least seven years after Ford knew of the dangerous propensities of the C-6 transmission, it continued producing and installing it in its vehicles," that the vehicle which killed Tommy Smith was a 1977 model manufactured five years after Ford knew of the dangerous propensity of its transmission, and "that by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous." 17a.

The jury found by "clear and convincing" evidence that Ford's conduct was "malic[ious]," which the instructions defined as: "mean[ing] conduct which [was] specifically intended by Ford . . . to cause tangible or intangible injury to the plaintiff" or conduct that was "carried out by Ford . . . both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." RA-28-29. The jury returned a verdict of $20 million in punitive damages.

Ford had twice challenged the Respondents' evidence before the verdict, unsuccessfully moving the trial court for a directed verdict at the close of Respondents' case in each phase of the trial. After the punitive verdict, Ford moved for a JNOV, and, when that motion was unavailing, Ford appealed to the Kentucky Court of Appeals, and then twice to the Kentucky Supreme Court (first on a petition for discretionary review and a second time on a petition for rehearing). On each occasion, Ford reprised the same evidence and the same arguments, each time contending that the Respondents' evidence was not admissible, was not credible, and was insufficient. Each time the Respondents' evidence was deemed admissible, credible, and sufficient.

The court below undertook a *de novo* review, 20a, and held that the jury instructions on punitive damages had been appropriate and sufficient. 14a-15a. Further, that court found that Ford had been "forcefully informed that its transmission was dangerous" ten years before it changed the design, 17a, and thus that there was ample evidence to

support the jury's finding that Ford's conduct constituted "flagrant indifference." 14a. Finally, after applying *BMW*'s three-part test, that court concluded that although Ford's conduct had been "substantial[ly]" "reprehensib[le]," 17a, and that although comparable penalties imposed in other cases provided Ford with constitutionally sufficient notice that its conduct could expose it to punitive damages similar in size to the one awarded by the jury, on balance that award was too high. Consequently, that court trimmed $5 million from punitive damage award, leaving a $15 million sanction and a five-to-one ratio of punitive to compensatory damages. 20a-21a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THIS PUNITIVE DAMAGES AWARD DID NOT PUNISH EXTRATERRITORIAL CONDUCT

Hoping to piggyback on this Court's pending decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, (No. 01-1289), Ford asserts that the judgment here, like the one in *Campbell*, was irredeemably tainted by unconstitutional extraterritorial punishment. Pet. 9. Thus Ford contends that "*Respondents relied at trial extensively on nationwide statistics* relating to Ford's transmissions, and urged punishment on the ground that 'millions and millions of vehicles already on the road . . . are backing up and running over people and causing death and destruction,'" throughout the country. *Id.* at 15-16 (emphasis added)(citing *id.*, at 5).

Whatever this Court's disposition in *Campbell*, that decision ought not govern the decision to grant certiorari in this case, nor should this case be held until *Campbell* is resolved, as Ford requests, Pet. 30, because the record in this case simply does not implicate the issues raised in that one. Assuming, most favorably to Ford, that the evidence presented, arguments made, and judgments entered in *Campbell* are exactly as presented in Petitioner State Farm's merits brief, this case could not be more

distinguishable either from that one or from the other two cases (out of the six cases Ford cites, Pet. 16-18), in which punitive damages were disallowed on extraterritorial grounds.[2] Thus, although there may be some need, some day to revisit the issues raised in *Campbell*—and extensively ventilated in the parties' briefs and the nearly two dozen amicus briefs filed in that case—this case is ill-suited to that venture. There are two reasons why.

A. Even After Ford Ignored the Trial Court's Repeated Warnings Not to "Open the Door," Respondents Made Only *De Minimus* References to Ford's Out-of-State Conduct

1. The *testimony* presented by Respondents in this case was far removed—in both origin and quantity—from *Campbell*. In that case the jury was allegedly presented with "massive amounts of 'expert' and other testimony proffered by plaintiffs regarding various alleged State Farm 'patterns and practices' nationwide." Pet. State Farm's Merits Brief, 2002 WL 1968000, at *6 (referencing more than 100 pages of record transcript). *See id.* at **8-12

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[2] *Compare White v. Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002)("[E]vidence focused on the number of vehicles Ford sold . . . and parking brake failures reported nationally. . . . The entire thrust of [plaintiffs'] argument was that . . . jury should vindicate the interests of all Ford truck owners everywhere.") and *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 n.24 (Ind.App.1999)(punitive damages disallowed because plaintiffs' counsel asked jury to award punitive damages based on sum of cost-savings-per-defective-product times the number sold nationwide), *with Cont. Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 637-38(10th Cir. 1996)(because "evidence here focused on OXY's Oklahoma activities," an instruction unnecessary); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253 (10th Cir. 2000) (instruction unnecessary as "out-of-state incidents offered to illustrate . . . reprehensibility"); *Johansen v. Combustion Eng., Inc.*, 170 F.3d 1320, 1333 (11th Cir.1999)(conduct punished occurred in single state). *OCF Corp. v. Ballard*, 739 So.2d 603, 606 (Fla.App. 1998)(issue of extraterritorial punishment waived by defendant).

(referencing another 320 pages).[3] "These massive amounts of testimony and evidence regarding State Farm's purported . . . practices nationwide overwhelmed the fact that State Farm's conduct toward Mr. Campbell was not shown to be anything other than an isolated, single occurrence in Utah." *Id.* at *11.

Here, by contrast, the only testimony concerning the "millions of vehicles" with defective C-6 transmissions, the "tens of thousands of incidents" where such defective transmissions spontaneously shift from park to powered reverse, and the "hundreds of deaths" that resulted from those defects and those incidents was introduced or invited by Ford. Such testimony came on Ford's direct and Respondents' cross-examination of *Ford's own witnesses*, not Respondents' witnesses. What's more, all the snippets of that testimony took up only *two minutes* of a trial that stretched over three-and-a-half weeks and took up less than *40 lines* out of more than 2,000 pages (and 50,000 lines) of record transcript in this case—a far cry from the days of testimony (and the 420 pages of transcript) on extraterritorial conduct that are at issue in *Campbell*.

Significantly, the only time the jury heard testimony regarding the "millions" of Ford vehicles with C-6 transmissions occurred when Ford's counsel examined a Ford witness.[4] Similarly, the only testimony regarding the

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[3] "[P]laintiffs . . . introduce[d] wide-ranging evidence of State Farm's disparate business practices and conduct nationwide," most "as part of plaintiffs' affirmative case." State Farm's Br., at *7. "Plaintiffs elicited testimony from" a half a dozen of their own witnesses "regarding a wide variety of purported practices nationwide by State Farm," *id.* at *8, including evidence on State Farm's lawful conduct in fifteen States. *Id.* at **8-12 (describing 320 pages of the Joint Appendix). One expert "told the jury that 'this case is . . . about State Farm's pattern and practices nationwide'" and "'more than what happened in Utah .'" *Id.* at *7.

[4] "*Q.* [by Ford's counsel]: 'How many, how many C-6 transmissions were on the road at that time frame?' *A.* [by Ford's witness]: 'Recognizing that the C-6 came out in 1966, it would be several million.'" RA-4.

"thousands" of incidents involving defective C-6s came during Respondents' cross-examination of a Ford witness.[5] Finally, the only testimony regarding the "hundreds" of C-6 related deaths occurred during Respondents' cross-examination of the same Ford witness.[6]

Indeed, Ford considered the Respondents' evidence on punitive damages was so slim that it moved for a directed verdict at the close of Respondents' case on punitive damages, arguing that "they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award in this case that has some evidentiary basis," and had provided "no information on number of vehicles, nothing from which the jury can do any such kind of math." RA-6.

2. The *arguments* made by Respondents' counsel in this case likewise were far removed from those made by plaintiffs' counsel in *Campbell*. Although Ford contends that Respondents' counsel impermissibly "urged punishment on the ground that 'millions and millions of vehicles already on the road . . . are backing up and running over people and causing death and destruction,'" Pet. 15-16, when that internal quote is placed in context it shows that

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[5] "*Q.* [by Respondents' counsel]: '[D]id you not sir testify in . . . *Hulsey v. Ford Motor Co.* . . . that there were 23,468 incidents involving Ford vehicles, and you answered yes. . . ?' *A.* [by Ford's witness, Lee Carr]: 'As you read it, but what you said was were there reports that said that was true and were there reports that said it wasn't true, and the answer to that question just as I gave it is yes. You asked me a different question, that is it true that there are 23,000? There are not. That is not true.'" RA-9.

[6] "*Q.* [by Respondents' counsel]: 'Are you---are you aware sir that as of the end of the NHTSA investigation some two hundred deaths had been connected to unintended reverse in Ford vehicles?' *A.* [by Mr. Carr]: 'There were some people who made that claim, but the records show that wasn't true. There were in fact however, a substantial number meaning, probably more than a hundred where people had been killed . . . in events where Ford vehicles moved for a variety of reasons . . . over about a ten year time period.'" RA-7.

"millions and millions of vehicles" were cited to establish Ford's "flagrant indifference to the rights of people on the highway . . . purchasers, consumers," RA-11-12 *i.e.*, one of the statutory elements Respondents needed to establish as a predicate for punitive damages liability, 12a (citing K.R.S. §411.184(1)(c)), and not as a measure of how much punitive damages should be awarded, let alone as a demand for extraterritorial punishment.[7] (Indeed, in *BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996), this Court stressed that such evidence is admissible and legitimate as it "is relevant to the determination of the degree of reprehensibility of the defendant's conduct." 517 U.S. at 574, n.21. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, n.28 (1993)).

By contrast, in *Campbell* plaintiffs' counsel insistently "urged the jury to impose punitive damages on State Farm for its nationwide conduct," telling "the jury that this case 'transcends the *Campbell* file' and 'involves a nationwide practice,'" and "'emphasiz[ing] to the jurors that they were 'going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country . . . .'" State Farm's Br. at *6 (internal citations omitted).

3. Unlike the Utah Supreme Court, which reinstated a $145 million punitive damage award against State Farm almost entirely on the basis of State Farm's "nationwide 'scheme'" and on the basis of evidence that showed the effects of this "scheme" far beyond Utah's borders, *id.* at 17-20, the court below never mentioned nationwide practices

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[7] Respondents' counsel suggested during his closing argument: "If you look at the jury instructions, they talk about flagrant disregard, . . . indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. . . . [Ford said:] 'Let's call a committee and talk about it and forget about it and hope this thing goes away. We will design out the defect starting in 80' and it will go away. We won't have to worry about those *millions and millions of vehicles already on the road that are backing up and running over people and causing death and destruction.*'" RA-11-12.

or the effect such practices had outside Kentucky and never purported to assume the power or the right to impose punishment for such extraterritorial conduct.

4. The trial court's errors, if any, also should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court. Inasmuch as Ford has conceded that the *de novo* review mandated by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431-40 (2001), was fairly and competently undertaken by the court below, whatever prejudice Ford may have suffered at the hands of the jury was cured by that court's reexamination of the evidence and its recalibration and reduction of the punitive damages awarded by the jury.

B. Because Ford "Open[ed] . . . the Door" to Evidence of Extraterritorial Conduct, It Is Estopped from Seeking Plenary Review of the Error It Invited and Provoked

Because the evidence and arguments regarding Ford's nationwide practices were first introduced and first made *after* the close of the Respondents' case on punitive damages and only *after* Ford itself had referenced such practices, Ford is estopped from complaining about the consequences of its tactical decision to do so under the "invited error" doctrine, which provides "'that a party may not complain on appeal of errors that he himself invited or provoked . . . .'" *United States v. Wells*, 519 U.S. 482, 488 (1997)(citations omitted). As noted above, Ford sought a directed verdict after the close of Respondents' punitive damages case on the ground that "they have given the jury no information, data or numbers." RA-6. As also noted above, whatever "information" Respondents referenced and whatever arguments Respondents made about C-6 related injuries nationwide came after Ford itself had introduced and discussed such data. Until that time, neither party had done so, even during the liability phase of the case, first, because Ford had "stipulate[d] that [it] was on notice, that

people were alleging that these events occurred," RA-2-3, and second, because Ford had successfully moved the trial court to forbid any discussion of the National Highway and Safety Administration's (NHTSA's) investigation and conclusions, and to forbid discussion of any complaints or data that had prompted NHTSA's investigation and had informed its conclusions. Pretrial Hrg. Order (Dec. 16, 1996), at 2.

When, however, during the punitive damages phase of the trial, Ford decided to reverse course and announced its intention to introduce the NHSTA report and associated data, the trial court repeatedly warned Ford that it was "open[ing] . . . the door" and could not thereafter complain about Respondents' cross-examining Ford's witnesses on these matters or presenting arguments on the basis of such testimony.[8] Although Ford's "plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on Ford and would preclude him from a decision on the merits of his federal [constitutional] claim either in the state courts or here." *Henry v. Mississippi*, 379 U.S. 443, 451 (1965). Because Respondents "responded to the invitation is scarcely grounds for any claim of error here." *DeMarco v. United States*, 415 U.S. 449, 450 (1974)(Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting from certiorari).

The invited error doctrine is especially apt in cases like this one. *See Ohler v. United States*, 529 U.S. 753, 755 (2000)(it is "well-established commonsense principle" that "a party introducing evidence cannot complain on appeal that [it] was erroneously admitted").[9] Because Ford chose to

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[8] The trial court warned: "I don't think you can get into the actions, the conclusions of NHTSA without getting into all of it. I think once you open it up, you open it up;" *and* "if we open up the door to NHTSA then everything about NHTSA comes in." RA-5.

[9] *See also United States v. Solis*, 299 F.3d 420, 452 (5th Cir. 2002)("when inadmissible evidence is attributable to the actions of the defense, the defense cannot later object to such invited error.'" (citations

ignore those warnings, it cannot now be heard to protest about the consequences of its own tactical choices.[10]

II. CERTIORARI IS UNWARRANTED AS THE JURY INSTRUCTIONS ON PUNITIVE DAMAGES MET *HASLIP'S* "REASONABLE RESTRAINTS" TEST

1. As this Court explained in *Pacific Mut. Life Ins. Co. v. Haslip*, "[a]s long as the [jury's] discretion is exercised within reasonable constraints, due process is satisfied." 499 U.S. 1, 20 (1991). Although Ford does not quote either the due process test established in *Haslip* or the instructions given to the jury in this case on punitive damages and approved by the court below, RA-28-29, it maintains certiorari is warranted because the instructions in this case were so "threadbare" that they left the jury without "any conceptual understanding of what it is they [were] being asked to award and why," and because the instructions

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omitted)). *Accord, United States v. Van Der Ent*, 52 Fed.Appx. 793, 795, 2002 WL 31780997, *2 (6th Cir. 2002); *United States v. Neal*, 78 F.3d 901, 904 (4th Cir.1996); *United States v. Console*, 13 F.3d 641, 660 (3d Cir. 1993); *Montgomery Elevator Co. v. McCullough* 676 S.W.2d 776, 783-84 (Ky.1984).

[10] On a related point, Ford twice insinuates that the verdict and judgments rendered in this case were tainted by unconstitutional considerations of Ford's wealth and its status as a large, out-of-state corporation, one ostensibly "'without [a] strong local presence.'" Pet. 13 (quoting *Oberg*, 512 U.S. at 432). Thus, Ford quotes the trial judge's comment that "'you can search the United States over and not find anybody that didn't know about Ford,'" Pet. 13 (citation omitted), and the dissenting justices' unsupported speculation that the jury and Kentucky Supreme Court majority sought to "'redistibute the wealth of an out-of-state corporation with requisite deep pockets . . . .'" Pet. 9 (citation omitted). Ford neglects to mention three points. First, the trial judge's above-quoted remarks were made during a bench conference, in which he stressed that he saw no reason for, and would not countenance, such evidence or discussion. Accordingly, Respondents presented no evidence and made no arguments regarding Ford's wealth. Second, far from being "without [a] strong local presence," Ford is the largest automaker and the largest private employer in the state, with 10,900 workers at its two Kentucky plants. http://www.think-kentucky.com/kyedc/pdfs/KYProfile.pdf.

particularly failed to "'enlighten[] the jury'" about the "'nature and purposes'" of punitive damages. Pet. 11 (citation omitted). As might be guessed from the fact that Ford lambastes the instructions at length, but never sees fit to quote them at all, they were drawn verbatim, 15a, from §§411.186 of the Kentucky "Tort Reform Act" of 1988, and that they were very detailed and tightly drawn.

Thus the jury was instructed that: (a) punitive damages were not designed to "compensate" the plaintiff; (b) were not mandatory but entirely "discretion[ary]"; (c) could only be awarded if the Respondents proved "malice" which was defined as: (1) "specific[] intent" to injure "the plaintiff" (but no one else); or (2) "flagrant indifference to the rights of the plaintiff" *and* "subjective awareness that such will result in human death or bodily harm" to the plaintiff (but no one else)); (d) Respondents needed to prove malice with "clear and convincing evidence"; and (e) if punitive damages were warranted at all, the jury needed to consider five additional factors to fix the proper amount. RA-28-29. (The "defendant-friendly" nature of these instructions was further shown by what they did *not* contain and did *not* allow the jury to consider: any harm, actual or potential, to anyone besides the "the plaintiff"; Ford's wealth or net income; and any need to discourage the misconduct of any other wrongdoers, *i.e.*, the much-feared "send-a-message-that-will-be-heard-across-the-state" instruction.)

These instructions scarcely qualify as "threadbare" ones that provide no meaningful guidance to the jury. Pet. 10. Indeed, they provided considerably more guidance to the jury than the rather formless and incoherent instructions this Court upheld in *Haslip*, 499 U.S. 6, n.1. (To facilitate comparison, the complete jury instructions in this case and those in *Haslip* are reprinted, RA-28-29.)

Although Ford maintains that it was deprived of due process because the trial court failed to define the purposes of punitive damages, neither *Haslip*, nor any other decision by this Court, nor any of the "raft of federal- and state-court

decisions," Pet. 12, that Ford cites held that instructions on purposes are indispensable rather than merely desirable, (unlike instructions on matters like "reasonable doubt," which are categorically imperative in every case. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970)). Thus Ford's lead case, *Baker v. Gen. Motors Corp.*, 86 F.3d 811 (8th Cir. 1996), *rev'd on other grounds,* 522 U.S. 222 (1998), did not hold that jury must be instructed on the purposes of punitive damages. In that case, the jury instruction regarding punitive damages stated, *in its entirety:* "You may consider any mitigating or aggravating circumstances attendant upon the death if you find any such circumstances." 86 F.3d 815, n.3. In reversing judgment for the plaintiff the Eighth Circuit merely stated, in *dicta*, that those instructions were "unconstitutionally vague." 86 F.3d at 818. Similarly, Ford's second case, *Farmers Ins. Exch. Shirley,* did not hold that the jury instructions were flawed because they supposedly omitted mentioning the purposes of punitive damages—in fact, the jury was given such an instruction—but rather because the instructions' definition of "malice" was vague and inaccurate. 958 P.2d 1040, 1050-52 (Wy. 1998). The other four cases Ford cites upheld instructions that discussed the purposes of punitive damages, but none held that they would not have done so in the absence of such discussions or that such discussions were essential to due process.

2. Even if the trial court's omission was constitutional error, this Court has often "recognized that 'most constitutional errors can be harmless,'" and that omitted instructions are particularly deserving of harmless error analysis. *Neder v. United States*, 527 U.S. 1, 7, 8-12 (1999)(citation omitted). Under such analysis, Ford has not asserted and cannot establish that that error "had substantial and injurious effect or influence in determining the jury's verdict." *Calderon v. Coleman*, 525 U.S. 141, 145 (1998)(citations omitted). Thus Ford has never explained how its rights were concretely affected in any way. The jury

was instructed, *inter alia*, that punitive damages were not for the purpose of compensation, that they could only be awarded for malicious conduct resulting in untoward profits. RA-28-29. The mere absence of the words "to punish and deter" are not of constitutional dimension.

Significantly, this Court has never insisted that instructions consist of a prescribed formula or "any particular form of words." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). "It is well established that the [constitutionality of an] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 73 (1991)(citation omitted). In this light—"in the context of the instructions as a whole and the trial record"—there is no reason to believe that the jury's discretion was not cabined within the "reasonable constraints," *Haslip*, 499 U.S. at 20, that Ford's "interest in rational decisionmaking" was not "reasonably accommodated," and that "due process [was not] satisfied." *Id.*

Moreover, if the trial court erred, that error was rendered harmless by Respondents' closing argument, where counsel cautioned the jury six times about the limited purposes of punitive damages. 15a; RA-9-11. Although Ford contends that counsel's argument can never substitute for court instructions, Pet. 12-13, citing *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Taylor v. Kentucky*, 436 U.S. 478 (1978), both cases stand for narrower principles and neither supports Ford's expansive claim. *Carter* held that "the absolute constitutional guarantee against compulsory self-incrimination" requires an instruction that a criminal defendant's decision not to testify may not be used against him, 450 U.S. at 301, while *Taylor* held that a criminal defendant is entitled to an instruction on the

presumption of innocence, which "lies at the foundation of . . . our criminal law." 436 U.S. at 483.[11]

Contrary to Ford's assertion, Pet. 12, neither case rejects Kentucky's use of "bare-bones" jury instructions, which does not substitute counsel's argument for required instructions. Rather, the judge gives the jury a "concise" statement of the applicable law, leaving the details of applying the instructions to the specific facts of the case to be "fleshed out" by counsel. *Young v. J.B. Hunt Transp.*, 781 S.W.2d 503, 506 (Ky. 1989). Here, the trial court offered Ford's counsel the opportunity to argue against awarding punitive damages on any improper basis. Counsel declined the invitation and said nothing at all about the purposes of punitive damages. Whether his "default . . . stem[med] from simple ignorance or the pressures of trial," or whether, as this Court has frequently condemned, a "deliberate[] choice to withhold" an argument "in order to 'sandbag'-- to gamble on" winning outright "while saving a dispositive claim," or an appealable (and hypothetically cert-worthy) issue "in case the gamble does not pay off," *Engle v. Isaac*, 456 U.S. 107, 129 & n.34 (1982), Ford is not permitted to profit from either its counsel's mistakes or his tactics. *See Granberry v. Greer*, 481 U.S. 129, 131-32 (1987); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

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[11] This Court limited *Taylor's* "hold[ing]" to "the facts of this case." 436 U.S. at 490. Although Ford quotes *Taylor* for the proposition that "'arguments of counsel cannot substitute for instructions by the court.'" Pet. 13, quoting *id.* at 488-89, it neglects to quote the succeeding sentence, which provides both the rationale for—and the limits to—this rule: "[defendant's] right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that *defense counsel* will be a more effective advocate for that proposition than the *prosecutor* will be in implying that extraneous circumstances may be considered." *Id.* at 489 (emphasis added). But that was not the case here, where both counsel had a chance for "advoca[cy]" about the legitimate purposes of punitive damages and the party "prosecut[ing]" the case repeatedly did so. *Carter's* holding "is similarly limited to its inapposite facts.

Moreover, as discussed in Section I.A.4., the trial court's errors, if any, also should be regarded as harmless because Ford is not seeking review of the verdict of a Kentucky jury but the judgment of the Kentucky Supreme Court.

3. Although some juries may be biased against large corporations "'without strong local presences,'" Pet. 13 (quoting *Oberg*, 512 U.S. at 432), it is highly unlikely that this jury was prejudiced against Ford. As explained above, no company, foreign or domestic, has a "strong[er] local presence[]" in Kentucky than Ford, where it is the largest company and employer in the state. *See* n.10, *supra*. Ford's claim that Respondent's counsel brazenly told the jury that their discretion was unlimited but nothing more, is also belied by the facts, as the "figure that [he] suggest[ed] to" the jury, was $45 million, not $500 million. RA-12-13.

4. Finally, if the gist of Ford's argument is that a definitional instruction on punitive damages is required by the Constitution, certiorari is not warranted because Kentucky has now adopted a new standard jury instruction manual, one that requires juries to be told that "'[p]unitive damages' are . . . for the sole purpose of punishing . . . and discouraging . . . ." 2 J. Palmore, KY. INSTR. TO JURIES (CIVIL) §39.15 at 44 (2003 Supp.). In light of this fact and in light of the fact that Ford has not identified another case in which another court has duplicated the putative error below, this case does not present an issue of sufficient national importance to warrant certiorari.

III. CERTIORARI IS UNWARRANTED BECAUSE THE KENTUCKY SUPREME COURT PROPERLY CONCLUDED THAT THE PUNITIVE DAMAGE AWARD WAS NOT "GROSSLY EXCESSIVE"

A. The Court Below Properly Concluded that Ford's "Intentional" "Malice" in Marketing a Product It Knew Was Dangerously Defective Was "Substantial[ly]" "Reprehensib[le]"

As this Court explained in *BMW*, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. Essentially asking this Court to sit as a court of errors, Ford contends that its conduct was not sufficiently reprehensible to warrant "any punishment," let alone the "excessive" jury award that substantially reduced by the court below. Pet. 24. According to Ford this is so because "*the underlying evidence* was simply that Ford's engineers were aware the C-6 transmission—[allegedly] like all automatic transmissions—could permit park-to-reverse migration in cases of incomplete shifts" and knew that "alternative designs could lead to even more mishaps," Pet. 22-23 (emphasis added), and that it allegedly had made a reasonable, "good-faith attempt to minimize competing safety risks," Pet. 23, as proven by the facts that: (a) the C-6 allegedly satisfied the supposedly relevant industry "recommendation"; (b) C-6 transmissions were no worse than those designed and manufactured by other automakers, as demonstrated by the fact that they were not involved in park-reverse accidents more often than those in other manufacturers' vehicles; (c) the C-6 design supposedly satisfied relevant federal motor vehicle safety standards (none of which were ever named or cited); (d) federal regulators, specifically NHTSA, had given the C-6 a clean bill of health, (e) and the "vast majority of other civil juries" had done the same. *Id.* (The evidence regarding Ford's "vast majority"—which showed that plaintiffs won "only" 26% of C-6 related cases—came in a two-page and conclusory affidavit from a Ford lawyer filed in support of Ford's motion for a JNOV. (filed July 28, 1997). RA-22-23.

Aside from the last, irrelevant, and misleading assertion that Ford had been exonerated by the "vast majority of

other civil juries,"[12] the "underlying evidence" regarding each of these points was fully presented Ford's to the jury in this case, which, looking at Ford's proof with a less self-interested eye, saw things quite differently and thus found that Ford was "100%" at fault for Tommy Smith's death. 70a. The jury found that far from making reasonable, good-faith efforts to minimize competing safety risks, Ford had acted "maliciously and/or with "flagrant indifference" in designing, manufacturing, and marketing the C-6 equipped the vehicle that killed him. Significantly, as noted above, Ford pressed the same evidence and fact-laden arguments to Kentucky courts six separate times in this case and never found a taker. Ford has advanced no reason why it is now entitled to what amounts to an eighth bite at the apple (counting the jury's) and why this Court should grant certiorari to review these quintessential jury issues[13] one more time. The fact that Ford did not obtain the result it

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[12] The fact that most "other . . . juries" supposedly saw it Ford's way is irrelevant because the different evidence presented in those cases cannot collaterally estop the proof established in this one. That datum also is misleading because Ford may have reasonably chosen to litigate the cases it thought it could win and to settle the cases it was sure to lose. Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 Emory L.J. 523, 558 (1996). In fact, Ford was required to pay out more than $5.9 million in compensatory and punitive damages in just three C-6 related cases that were tried to a verdict (including $4 million in punitive damages), and more than $5.5 million in just *22* public settlements during the 1970s and 1980s. RA-26-27. "Many settlements are, of course, confidential and therefore never reported." Michael I. Krauss, *Product Liability And Game Theory*, 2002 B.Y.U. L. Rev. 759, 827, n.10 (2002).

[13] Courts agree that compliance with industry or government standards is a jury question. *See, e.g., James G. Brown Fnd., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991); *Kuwait Airways Corp. v. Am. Sec. Bank, N.A.*, 890 F.2d 456, 464 (D.C. Cir. 1989); *Safeco Ins. Co. v. City of White House*, 191 F.3d 675, 687 (6th Cir. 1999); *Boerner v. Brown & Williamson Tob. Corp.*, 260 F.3d 837, 846 (8th Cir. 2001); *Alfred v. Caterpillar, Inc.*, 262 F.2d 1083, 1089 (10th Cir. 2001).

sought from the jury and six times from the courts below does not make this case cert-worthy.

This is particularly so because what the "underlying evidence" truly showed was that there were no written industry or government design, manufacturing, or performance standards on the key questions of how an automatic transmission should be built (aside from an irrelevant "recommend[ation]" for a "standard pattern or sequence"—the familiar "P-R-N-D-L"—"for the manual control of automatic transmissions," RA-20-21, that C-6 transmissions spontaneously shifted into reverse far more often than those made by Ford's competitors, 12a, that NHTSA's inaction was more an expression of exhaustion than exoneration, *see Center for Auto Safety v. Lewis*, 685 F.2d 656, 600 (D.C. Cir. 1982), and, in any event neither regulatory inaction nor compliance with government regulations preempts state common law tort remedies or bars awards of punitive damages where, as here, a tortfeasor's conduct transgresses the state law standards for such awards.[14]

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[14] Ford variously asserts that its putative compliance with industry custom and government standards "precluded any award of punitive damages," Pet. 23, that "punitive damages are altogether barred when the defendant has complied with industry standards or federal regulations," *id.* at 20 & n.7, and, because NHTSA has the power to set safety standards and to recall defective products but failed to do so, Congress has impliedly proscribed not only the punitive damages awarded in this case but the compensatory damages as well. *Id.* at 23 & n.9. Indeed, under Ford's theory all motor vehicle products liability suits would be impliedly preempted as NHTSA surely has the power to issue recall in all types of cases. Suffice it to say that Ford's theory is contrary to this Court's decisions in *Silkwood v. Kerr-McGee, Corp.*, 464 U.S. 238, 250-51 (1984)(compliance with government safety standards does not preclude punitive damages in a common law tort action); *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 886 (2000)(common law tort claims preempted only because specific federal regulations directly conflicted with state tort law); *Sprietsma v. Mercury Marine*, 123 S.Ct. 518, 527 (2002)(federal agency's inaction does not preempt common law tort claims). Nor do the six cases Ford cites, Pet. 20, n.7, support its claims that compliance with industry or government standards is an absolute

Tellingly, Ford fails to discuss the key facts that the court below decided, after a conscientious *de novo* review, were predicates for its conclusion that Ford had "act[ed] with flagrant indifference to the lives of its consumers," 14a, indifference that prompted the judgment that Ford's conduct was "substantial[ly]" "reprehensib[le]." 17a. Thus, although Ford claims that it was but should not have been punished for its "*mere awareness* of the safety tradeoff posed by the C-6 transmission and alternative design," Pet. 22 (emphasis added), and for its supposed reasonable, "*good-faith* attempt to minimize competing safety risks," Pet. 23 (emphasis added), it was not punished for either its "mere awareness" or its "good faith." Rather, Ford was held liable for punitive damages not because of the company's faint cognizance that somewhere, somehow, some day, some people might be inconvenienced or even slightly hurt by C-6 equipped vehicles, but because—over a period of ten years—Ford had been repeatedly and "forcefully informed" (both by "many of its consumers, some of whom [had been] maimed and killed," and by leading members of its

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bar to punitive damages as a matter of law; instead, all that those cases say is that compliance is one of many factors to be considered, and never the sole or dispositive one. Other courts have routinely rejected Ford's contentions. *See, e.g., OCF Corp. v. Golightly*, 976 S.W.2d 409, 411 (Ky. 1998)(punitive damages not precluded by compliance with industry standards); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1458 (10th Cir. 1985)(same re federal safety standards); *Gonzales v. Surgidev Corp.*, 899 P.2d 576, 590-91 (N.M. 1995)(same); *Mulhern v. Outboard Marine Corp.*, 432 N.W.2d 130, 135 (Wis. Ct.App. 1988)(same). Perhaps the best evidence that vast majority of courts have not barred punitive damages even if a defendant actually complied with industry government standards is that tort "reform" advocates are continually urging Congress and state legislatures to enact provisions like the one presently before the 110th Congress in H.R. 5, §7(c) which would preclude punitive damages if pharmaceutical manufacturers have complied FDA regulations. *E.g.*, Peter W. Huber: LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 48 (1988)("The law today can be very simply stated: Advance regulatory approval . . . counts for nothing definite in [a] subsequent lawsuit."

engineering staff) that C-6 transmissions were ticking time bombs, and Ford still did nothing. 17a.

Thus, Ford was not "merely aware" that sometime, something might go awry; rather, it "was well aware" that the C-6s were very dangerous. 14a. Thus, Ford did not make "simply . . . mak[e] a good-faith election among competing designs," Pet. 24; rather, it acted with "malice" and thus made willful, wanton, intentional decisions to do nothing for ten years, nothing except to count the dead and injured and pay off millions in punitive damages and millions more in compensatory damages and settlements instead of implementing the design change that the "Principal Engineer" in Ford's "Safety Systems Department" had recommended in 1972. 31a, n.2. In sum, Ford was assessed punitive damages in this case not for "mere awareness" and "good-faith" choices, but for substantial knowledge, for flagrant, malicious, intentional indifference and misconduct in light of that knowledge, and for the deadly effects of that indifference and misconduct.

Ford's characterization of its "underlying" conduct as a mere "non-intentional tort[]," Pet. 21, and its contention that its "good faith line-drawing decisions evince [d] diminished reprehensibility" rather than establishing the "'intentional malice'" that *BMW* recognized as being "particularly reprehensible" and deserving of punitive damages, *id.* at 25, quoting *BMW*, 517 U.S. at 576, is similarly at odds with the record. As noted above in Section II, the jury was specifically instructed that it could award punitive damages only if the "plaintiff[s] . . . prove[d] malice,"—with "'*[m]alice' mean[ing]* either conduct which [was] *specifically intended* by Ford . . . to cause tangible or intangible injury to the plaintiff or conduct that [was] carried out by Ford . . . both with a flagrant indifference to the rights of the plaintiff *and subjective awareness* that such conduct will result in human death . . . " – and if the Respondents did so "with clear and convincing evidence."

71a, 72a (emphasis added). And the jury specifically so found. 72a-73a.

In this light, Ford's conduct meets every one of the three "aggravating factors" that *BMW* recognized as "associated with particularly reprehensible conduct": (1) a design that had a substantial "effect on [its product's] performance or safety features"; (2) it acted not only with "indifference to or reckless disregard for the health and safety of others," but proven "intentional malice"; and (3) the harm was not "purely economic in nature" but death. 517 U.S. at 576.[15]

In sum, although there certainly may be cases in which certiorari might be warranted because a defendant has been assessed punitive damages for "mere awareness" and "good-faith" decisions in a mere "non-intentional" tort, the facts of this case establish that it does not fall within that category.

B. The Court Below Properly Applied *BMW's* Ratio Guidepost, and the Five-to-One Ratio in This Case Is Neither Too High Nor Unusual

BMW's second guidepost for determining whether a punitive damages award is "unreasonable or excessive" requires reviewing courts to compare such awards to both

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[15] Finally, Ford raises the specter that unless this Court reverses the decision below, "then the first *BMW* guidepost [will] offer[] no limiting value at all in products cases, with every manufacturer in America subject to an eye-popping punitive damage award any time a jury disagrees *ex post*" with a manufacturer's allegedly "good-faith assessment of product design risks and benefits." Pet. 24. The risks of that calamity occurring are minuscule, not least because this case marks only the second time in 33 years that Ford has been assessed punitive damages in a C-6 related case. Judge Posner and other scholars agree that the empirical evidence shows that punitive damages are awarded in less than 1% of ordinary personal injury cases, *see, e.g.*, Deborah Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327, 1361 & n.120 (2002); Herbert Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases*, 51 DePaul L. Rev. 219, 237 (2001), and in even less than one percent of products liability cases. *See, e.g.*, William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW 304-07 (1987); Theodore Eisenberg, *The Predictability of Punitive Damages*, 26 J. Legal Stud. 623, 635-37 (1997); BJS Bulletin, *Civil Justice Survey*, 1 (2000).

"the actual harm inflicted on the plaintiff," and the potential "harm likely to result from the defendant's conduct." 517 U.S. at 580, 581. Applying that test, the court below observed that, on one the one hand, "[i]t would be impossible to overstate the degree of harm" to Tommy Smith and his estate: to him, a painful, crushing death; to his Estate and family, "the total destruction of his power to labor . . . earn money" and provide love and companionship. 17a. On the other hand, the court below noted that "substantial compensatory damages [of $3 million] were awarded" and the $20 million in "punitive damages [awarded by the jury] was almost seven times compensatory damages." 17a-17b. Balancing these and other factors, the court below decided to trim $5 million (or 25%) from the jury's punitive damages award, 20a-21a, leaving a five-to-one ratio of punitive to compensatory damages, a ratio well below those upheld by this Court prior to *BMW* and routinely upheld by federal and state appellate courts in products liability, and personal cases since *BMW*.[16]

Ford nevertheless urges this Court to grant certiorari in this case, arguing that the court below "eviscerated" the ratio guidepost, Pet. 27, because it failed to realize that this case supposedly did not involve the kind of "'egregious' . . . intentional misconduct'" at issue in *Haslip, TXO*, and *BMW*, Pet. 26, quoting *BMW*, 517 U.S. at 582, but mere garden-variety negligence. *Id.* In Ford's estimation, its negligence produced a simple personal injury, one that was readily

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[16] *See e.g., Clark v. Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002)(applying Kentucky law; *12:1* ratio justified because defective product caused death); *Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1165–66 (10th Cir. 2000); *12:1* ratio warranted because "the [toxic tort] injury is hard to detect [and] the monetary value of noneconomic harm . . . [is] difficult to determine"); *Davis v. Rennie*, 264 F.3d 86, 116 (1st Cir. 2001); *10:1* ratio; assault and battery caused "significant actual and potential [physical] harm"); *Axen v. Am. Home Prods., Inc.*, 974 P.2d 224, 243 (Or.App. 1999), *cert. denied*, 528 U.S. 1136 (2000); *8.3:1* ratio; defective product caused blindness); *Barnett v. La Societe Anonyme*, 963 S.W.2d 639, 669 (Mo.App. 1997) *7.8:1* ratio; product caused death).

discerned, and one that was more than adequately redressed by a "high" compensatory award of $3 million, and thus did not warrant a "high" five-to-one ratio. *Id.* Ford's petition should be denied, though, because it is Ford, not the court below, that misreads the applicable *BMW* standard and Ford that misportrays the facts of this case—including the crucial fact that the jury and courts below concluded that Ford had acted with intentional malice.

As an initial matter, although Ford correctly notes that "[t]his Court has considered the application of [the ratio] guidepost only in cases involving intentional wrongdoing," Pet. 26, it neglects to note that unlike the three pre-*BMW* cases it cites for the proposition that a State's legitimate interest in punishment and deterrence may be satisfied by low ratios or even no punitive damages at all, *id.* at 27 & n.11, every post-*BMW* court that has considered the issue has concluded that ratios higher than the one at issue here are often needed to adequately punish and deter. *See* note 19, *supra*. Significantly, these courts have explained that high ratios are not only not inconsistent with *BMW* but compelled by this Court's "view[s] that some wrongs"—such as violent crimes and torts that result in physical injuries—"are more blameworthy than others," *BMW*, 517 U.S. at 575, that torts involving "intentional misconduct" "are more reprehensible than negligence," *id.* at 576, and that "intentional malice" that produces a substantial "effect on [a product's] performance or safety features" and causes injuries that are not "purely economic in nature" are "particularly reprehensible." *Id.*

Ford's depiction of both the compensatory damages award and the five-to-one ratio in this case as "high" is as tenuous as its scholarship. Ford does not explain why it portrays the $3 million compensatory award for causing the painful death of a young husband and father as "high," and, indeed, the fact that Ford never contested the size of that award and has paid that judgment, suggests that Ford

never thought it was high at all. Nor does Ford explain why a five-to-one ratio is too high for a wrongful death case in which the jury and court below found clear and convincing evidence that Ford's decades-long actions implicated every one of the previously discussed "aggravating factors associated with particularly reprehensible conduct." *BMW*, 517 U.S. at 526. Importantly, Ford also fails to explain why, where, or how this Court should draw the "mathematical bright" line it has eschewed in *BMW*, 517 U.S. at 583, *TXO*, 509 U.S. at 458, and *Haslip*, 499 U.S. at 18.[17]

C. The Punitive Damages Award Was Comparable to Other Penalties That Had Been or Could Be Imposed

In *BMW*, this Court stated the "[e]lementary notions of fairness . . . dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose," as measured by, *inter alia*, either "the difference between this

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[17] Finally, although Ford obliquely raises the general prospect that unreasonably high ratios in some cases might lead to some amount of "overdeterrence" and might produce a punitive award that "cannot be justified by reference to a State's legitimate interests," Pet. 27-28 & n.11, there is certainly no evidence that Ford has been overdeterred regarding C-6 transmissions. Anything but. Tommy Smith's death could have been avoided if Ford had done any one of three things: (1) heeded its customers' complaints, and its own engineers' warnings and recommendations, and redesigned C-6 transmissions before one was installed in the 1977 truck that killed him; (2) voluntarily recalled the defective transmissions and retrofitted the safer design features that Ford installed in new vehicles beginning in 1980; or (3) taken the steps to ensure that every owner and foreseeable user of a C-6-equipped vehicle had received adequate warning and that every such vehicle displayed such warnings for the benefit of those drivers who were not registered owners. Ford took none of those steps, despite the fact as early as 1986, it was reporting to its stockholders and the SEC that it faced $1.6 million in claims, RA-24-25, despite the fact that it had already been forced to pay out in $11,418,000 in three verdicts and 22 public settlements of those claims, and despite the fact that it had already been obliged to pay $400,000 in compensatory damages and $4 million in punitive damages in a C-6 related case eleven years before Mr. Smith was killed. *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex.App.1982).

remedy and the civil penalties authorized or imposed in comparable cases," 517 U.S. at 574-75, *or* a "[c]ompari[son] [between] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. In the court below, Ford focused initially and most extensively on this Court's first articulation of the third excessiveness guidepost—the "civil penalties authorized or imposed in comparable cases"—explicitly inviting the comparison of the punitive damage awards in this case to those awarded in other Kentucky cases. Thus, Ford began by asserting "*Kentucky's prior jury verdicts provided no warning* to Ford that it might be subjected to a $20 million penalty for offering the same type of product as its competitors sold. . . . (See Tab 2)." Appellee/Cross-Appellant Ford's Brief to Ky. Sup. Ct. (filed Oct. 2, 2000) (Ford Br.) at 51-52. "Tab 2" formed the longest portion of Ford's Brief, a 33-page analysis of 113 cases in which Ford "compar[ed] the $20 million punitive damage award in this case with other awards upheld by" Kentucky appellate courts "and federal courts interpreting Kentucky law . . . as early as 1830." *Id.*, Tab 2: Preface.

The court below accepted Ford's invitation to undertake this case-by-case comparison but reached a contrary conclusion, explaining that "[w]hile Ford is correct that our decision in *Hanson v. American Bank,"* 865 S.W.2d 302 (Ky. 1993)(upholding $5 million in punitive damages), "is the largest award ever finally affirmed by Kentucky courts, it is also true that this Court has in recent years encountered punitive damages in several cases and shown no particular disinclination to uphold such awards where the evidence justified it." 19a & n.43 (citing cases).[18] Thus, the court

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[18] Inasmuch as *BMW* does not forbid extraterritorial comparisons, just extraterritorial punishment, Ford also had notice from: (a) other punitive damage awards in cases involving C-6-related transmissions, *see, e.g., Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex.App.1982)($400,000 in compensatory damages, $4 million in punitive damages; 10:1 ratio)(in Ford's motion for a JNOV (filed July 28,

below held that "Ford had fair warning that it might be subjected to a significant penalty in a Kentucky court." 18a.

Having failed to receive the response it sought from its invitation, Ford now seeks certiorari on the untenable ground that the court below should not have accepted the invitation Ford implored it to take, but, instead, should have focused exclusively on Ford's alternative theory, that the punitive damages awarded by the jury should have been voided because the "maximum civil penalty" authorized by Congress is only 1/25 the size of that award and because the only "criminal sanction authorized by the Kentucky legislature is but 1/1000 of the penalty imposed in this case." Ford Br. at 51 (citing K.R.S. §534.050(1). *See* Pet. 29.

There are three reasons why the Court should decline certiorari on these grounds. First, if error was made by the court below it was error expressly invited by Ford, which, as noted above, specifically asked that court to undertake exactly the award-by-award comparison that Ford now conveniently disowns and disdains. Ford Br. at 51-52 & Tab 2. Ford also protests the time frame used by the court below in making comparisons, castigating that court because it "referred to several Kentucky verdicts awarding punitive damages in wholly unrelated contexts approximately twenty years after the C-6 transmission in this 1977 pickup

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1997) at 78-79, Ford calculated that the $4 million award in *Nowak* was equivalent to $16 million in 1997 dollars); (b)punitive damage awards in other products liability cases against Ford, *see Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal.App. 1981)($128 million in punitive damages for exploding Pinto fuel tanks remitted to $3.5 million)); *Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470 (Ga.App.1984)($8 million punitive damages award); *Miles v. Ford Motor Co.*, 914 S.W.2d 135 (Tex. 1995)($10 million in punitive damages vacated on jurisdictional grounds); and, most pertinently, (c) punitive damages of sorts awarded against Ford in Kentucky a year before Mr. Smith was killed, a case in which Ford was sued by two survivors of a school bus crash that killed 27 students. According to a prize-winning journalist who reviewed the award, $8 million of the $10 million award was for punitive damages. James S. Kunen, RECKLESS DISREGARD, 305-06, 336-37 (1994).

was produced." Pet. 29. Ford thinks this was a cardinal constitutional sin, because "by finding fair notice in jury verdicts rendered years after the conduct at issue, the decision below eviscerates the comparable fines guidepost." *Id.* at 28. Even accepting the fiction that Ford's duties to consumers, and its relevant "conduct," ends when one of its vehicles leaves the plant gates, in comparing the award in this case to post-1977 cases the court below was once again simply doing what Ford invited it to do, because 53 of the 113 cases discussed in Ford's brief to court below were post-1977 cases, including 15 cases that were published after Mr. Smith was killed in 1993. Ford Br., Tab 2, at 1-32. Under the "invited error" doctrine, *see* in Section I, *supra*, Ford is estopped from raising both of these arguments and from seeking certiorari on these grounds.

Second, although Ford contends that the approach taken by the court below has no basis in *BMW*, Ford is plainly wrong. Thus, in accepting Ford's invitation to make an award-by-award comparison, the court below: (a) relied upon *BMW*'s guidance about "'civil penalties . . . imposed in comparable cases,'" 18a (quoting 517 U.S. at 575); *see* 17a, n.37 (citing *BMW* and *Cooper*); (b) sensibly followed this Court's guidance that "penalties" can "take the form of legislatively authorized fines *or* judicially imposed punitive damages," *BMW*, 517 U.S. at 572 (emphasis added); and (c) made the invited comparisons. Importantly, numerous other *post-BMW courts* have followed Judge Posner's lead and used the identical approach as the court below. *See, e.g., Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996)(Posner, J.)("Neither the size of the awards nor their ratio . . . is out of line with comparable cases.").[19]

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[19] *See also EEOC v. Harbart-Yeargin, Inc.*, 266 F.3d 498, 516-17 (6th Cir. 2001); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 598 (5th Cir. 1998); *Sabir v. Jowett*, 214 F.Supp.2d 226, 247 (D. Conn. 2002); *Niebur v. Town of Cicero*, 212 F.Supp.2d 790, 823-24 (N.D. Ill. 2002); *LaFate v. Chase Manh. Bank (USA)*, 123 F.Supp.2d 773, 790 (D.Del. 2000); *Valle v. Nat'l Basketball Assn.*, 42 F.Supp.2d 334, 345-46

Third, although Ford fancies that its intentional misconduct was not "criminally sanctionable at all under the laws of Kentucky," Pet. 29, and that even if it was the "maximum *penalty* for any felony is [a] $20,000" fine, *id.* (emphasis added), Ford is wrong on both counts. K.R.S. §500.080(12) defines a corporation as a "person," and K.R.S. §507.040 prescribes that "[a] person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including . . . situations where the death results from the person's operation of a motor vehicle." Furthermore, although Ford is correct that even a conviction for a felony like manslaughter could lead to a fine no larger than $20,000, Ford is mistaken in thinking that a fine is the only weapon in Kentucky's legislative arsenal. Thus, the Kentucky Constitution, §205, commands that the legislature "shall . . . provide for the revocation or forfeiture of the charters of all corporations guilty of abuse or misuse of their corporate powers, privileges or franchises, or whenever said corporations become detrimental to the interest and welfare of the Commonwealth or its citizens." Pursuant to that grant of power, the legislature has authorized the attorney general to seek and circuit courts to order the dissolution of a corporation and revocation of its charter for "abuse of the authority conferred upon it by law," K.R.S. §271B.14-300(1)(b), including "corporate liability" if the "conduct constituting the offense is engaged in, authorized, commanded or wantonly tolerated by the board of directors." K.R.S. §502.050(1)(b). Ford's conduct qualifies as "abuse" and, as such, exposes Ford to having its charter forfeited or revoked.

CONCLUSION

The petition for a writ a certiorari should be denied.

(S.D.N.Y. 1999); *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1169-71 (NJ App. 2002); *Stroud v. Lints*, 760 N.E.2d 1176, 1182-84 (Ind.App. 2002).

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APPENDIX

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A. Relevant excerpts of trial transcript, 41st Judicial Circuit Court, Civil Action No. 94-CI-00167

Cross-Examination of Melvin Richardson, Engineer, Engineering Design, Inc., by Lionel Hawse, Counsel for Defendant, Ford Motor Co., June 24, 1997, Regarding Ford's Stipulation that it Was "On Notice" Regarding C-6 Related Accidents.

[Mr. Hawse]: What did happen was, Ford was on notice that people were alleging that they put the gear shift into park and it "jumped out of park and went into reverse". Mr. Richardson *(TIME: 16:28:33)* will concede and has conceded in depositions in this case that no Ford transmission of any type when put into the, that's design nominal when put into park will "jump out of park and go into powered reverse". We have in our motion in limine, if notice is just the issue, we are willing to stipulate that Ford was on notice, that people were alleging that these events occurred. Mr. Madden is exactly right, Ford is a responsible company and when these complaints came in they did start investigating to see if there was some malfunction or defect in the system. They investigated it a long period of time before the federal government stepped in. The federal government stepped in and conducted what they concede was the most expensive, biggest investigation they ever ran and never found a defect in the transmission. Now, certain changes were made to attempt to uh---give the, give the operator a sense of security in getting to park, but what they found was a lot of the cases were not broken, not park reverse cases, but just transmission problems. A lot of cases were going down the road and the vehicle did something that they thought was different. A lot of cases *(TIME: 16:29:59)* where somebody bumped the gear shift lever. A lot of cases there were broken parts. There were many causes of this, but nobody ever came up with a "design defect in the transmission", and that is what they are trying to do is they are trying to paint

with this big broad brush that thousands of these cars were jumping out of park because of some design problem. That is incorrect.

Tape 41-97-VCR-042-A-1, 16:28:58-16:29:09 (Tr. Vol. II, 178:7-9)

Direct Examination of Wayne Napier, Vice President, Sand Hill Energy Corp., by Rickey Bailey, Counsel for Plaintiff, Estate of Tommy Smith, June 26, 1997, Regarding the Circumstances of the Death of Tommy Smith.

A. From the other side it appeared that he was setting on the bumper, so I just got in my truck; I had the door open on my pick up and I just got scooted in my truck and drove around to the corner of the trailer *(TIME: 09:13:48)* to where, like the corner of the trailer here and drove around to where he was at and when I pulled up I seen that the truck was against him, against the trailer and I jumped out of my pick up and the Ford truck that he was using was setting there; I seen quiver in the truck you know like when I run to him and I run as hard as I could and jumped in the truck, and I did not look at no gear shift; I just grabbed it and jerked it down in gear and pulled it away from him.

Q. Was the truck running?

A. It was running; the truck was running.

Q. Was the door open or closed?

A. The door was open and I pulled away from it and then run to him as hard as I could and hollered for them other two that was over there a working on that back dump.

Q. And what did you do then?

A. We tried to give them CPR and stuff which I take eight hour course ever year of renewal course of CPR and stuff which all the employees do.

Q. Did you check to see if he had a pulse at that time?

A. Yes, I did.

Q. Was he breathing at that time? *(TIME: 09:14:52)*

A. Yes.

Q. What happened next? Did you all call the ambulance or what?

A. We called Red Bird uh—ambulance service and they was down there in just like a matter of very short minutes cause it's only like six miles from there to the Red Bird Ambulance Service.

Q. Did the ambulance people take him somewhere?

A. They took him to Memorial Hospital here at Manchester.

Q. Did you follow them over or come over?

A. Yes I did.

Q. Do you know about what time it was when they got to Memorial Hospital?

A. No, I don't, but it was fast.

Q. Alright. Did they, I assume they took him to the hospital to do medical treatment on Mr. Smith?

A. yes.

Q. And at some point in time were you informed that the had died?

A. Yes.

Direct Examination of Frederick W. King, Engineer, Ford Motor Co., by Lionel Hawse, Counsel for Defendant, Ford Motor Co., July 8, 1997, Regarding the Number of Ford Vehicles with C-6 Transmissions.

Q. How many, how many C-6 transmissions were on the road at that time frame?

A. Recognizing that the C-6 came out in 1966, it would be several million.

Tape 41-97-VCR-053-A-11, 15:12:19-:26 (Tr. Vol. IX, 1290:8-:11).

At the Start of the Punitive Damage Phase, July 11, 1997, Regarding Trial Court's Warnings to Ford About "Opening the Door" to Discussion of the NHSTA Report and Underlying Data.

By the Court: As to Mr. Richardson other incidences where he has personally examined one hundred of these, I think that's admissible. Cooper I'm ruling out as I did previously. NHTSA I don't think you can get into the actions, the conclusions of NHTSA without getting into all of it. I think once you open it up, you open it up. Now, that leaves us from a procedural standpoint of where we go from here. If Mr. Hawse is avowing to the court that he's going to get into that, then I'll let the plaintiffs get into the whole report. Cooper is out though. I just think that is an isolated incident, and I just can't give that any scientific validity at all.

Mr. Bailey: Well, is he gonna get into it or not? Because I need to know for the questions I will ask Mr. Richardson.

Mr. Madden: And for opening statement. (*TIME: 10:52:42)*

Mr. Hawse: Well, I would like for the court to outline what your, what your position is on each of these points, and then I would like to have an opportunity to have a strategy session for a few minutes with my--

By The Court: Well I think I've outlined my position.

Mr. Hawse: Well, you have outlined your positions thus far, and in particular the point you just raised was that if we open up the door to NHTSA then everything about NHTSA comes in. You haven't addressed---

By The Court: I think you have to open that door first.

Mr. Hawse: Pardon me?

By The Court: I think you have to open that door first.

Tape 41-97-VCR-055-A-13, 10:51:53-17; 10:53:08-15 (Tr. Vol. A, p. 99:9-13; 100:11-12).

Oral Motion for Directed Verdict by Defendant, Ford Motor Co., July 11, 1997, at the Close of Plaintiffs' [Respondents'] Case in the Punitive Damages Phase.

> [Mr. Cowgill]: Your honor, comes the defendant, *(TIME: 14:39:27)* Ford Motor Company and moves for the entry of a directed verdict in its favor on the Plaintiff's claim for punitive damages. The plaintiff has now announced that it has closed all evidence that it intends to offer in support of its claim for punitive damages.
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> * * *
>
> Likewise when you turn to the amount of punitive damages, they have given the jury no information, data or numbers from which the jury could return any meaningful punitive damages award in this case that has some evidentiary basis. They knew that they needed to do that. They knew that was required of them, and that is why the plaintiffs as part of their prima facia case attempted to put in numbers through Mel Richardson, but for whatever reason, whether it was because they had not properly identified him as an expert on that point or for whatever, the fact of the matter is now that they didn't do any such numbers. We have no information on cost differences. We have no information on number of vehicles, nothing from which the jury can do any such kind of math. You have no other basis for the jury to fix any concept of punitive damages. As a result we are in a situation right now Judge where if this case goes to the jury on punitives, whatever number it would come back with would be completely out of the blue and subject to extreme attack on appeal for being just completely speculative and without foundation in the evidence. As I say they knew they needed to offer that kind of *(TIME: 14:50:02)* evidence.

Tape 41-97-VCR-055-A-13, 14:48:42-59, 14:49:26-34 (Tr. Vol. B, 225:1-5, 15-17).

Cross-Examination of Lee Carr, Mechanical Engineer, Carr Engineering, Inc., by R. Scott Madden, Counsel for Plaintiff, Estate of Tommy Smith, July 16, 1997, Regarding the Total Number of Incidents/Accidents and Deaths Concerning C-6 and C-6 Related Transmissions.

Q. According to the NHTSA report that you've talked about here today and about the settlement which you made reference, how many incidents did Ford Motor Company report to NHTSA that had occurred of unintended park to reverse movement involving C-4, C-6 and FMX transmissions prior to the beginning or at least during the conduct and ongoing NHTSA investigation? How many *(TIME: 15:35:29)* incidents were reported?

A. I don't remember a number, but a lot.

Q. Would you agree sir that some nineteen thousand or twenty-three thousand total incident reports were made known to NHTSA?

A. No. That's completely false.

Q. Are you---are you aware sir that as of the end of the NHTSA investigation some two hundred deaths had been connected to unintended reverse in Ford vehicles?

A. There were some people who made that claim, but the records show that wasn't true. There were in fact however, a substantial number meaning, probably more than a hundred where people had been killed, received fatal injuries in events where Ford vehicles moved for a variety of reasons, they were struck or hit or injured over about a ten year time period.

Q. And you agree sir with the safety engineering principle that any risk of serious personal injury or death is always unreasonable and always unnecessary if an economically feasible and technologically feasible alternative safety design existed, don't you?

A. I agree with that in a general sense. Yes sir.

Q. You would agree sir, would you not, that nobody is perfect? *(TIME: 15:36:40)*

A. Of course.

Q. No company is perfect?

A. Of course.

Q. No designer is perfect?

A. Of course.

Q. No design team is perfect?

A. Of course.

Q. Design teams have numerous members?

A. Sure.

Q. Members come and go over the years?

A. Of course.

Q. Who made the ultimate, final decision to not retro-fit the pre-1980 model vehicles? Who made the final call?

A. There was no single individual. I was one of a group of about a hundred people involved in that and we all came to that conclusion within the Ford Motor Company. There were at least a dozen in the agency, national Highway Traffic safety administration that I knew of that considered that and also said don't do that; that isn't right.

Q. Do you agree or disagree with the statement of Fred King in this court that he has never known of a Ford design defect that made it into production, do you agree *(TIME: 15:37:28)* with that? There's never been a Ford design defect that made it into production?

Mr. Hawse: I object, that's an improper characterization of the testimony your honor.

By The Court: Overruled.

A. I don't know what Fred King said, but as I have testified here I, myself, have recalled vehicles that had design defects.

Q. Design defects?

A. Sure. Yes sir. Design defects can arise and that has arisen in my view and I've had experience with that and I've recalled them because of it.

Q. Okay. Did you not sir testify in the case of Hulsey v. Ford Motor Co. ... in response to the question about the NHTSA report that was rendered, did you not say I am aware of a report written in 1980 that said there was, and I'm aware of a report written in 1980 that said there was not, both, talking about a defect, both written by employees of the [NHTSA] as a part of the totals in regard to the claim that there were 23,468 incidents involving Ford vehicles, and you answered yes, there had been twenty-three; was there 23,468 vehicles, and did you answer that question yes?'

A As you read it, but what you said was were there reports that said that was true and were there reports that said it wasn't true, and the answer to that question just as I gave it is yes. You asked me a different question, that is it true that there are twenty-three thousand? There are not. That is not true.

Tape 41-97-VCR--56-A-14, 15:35:20-15:39:10 (Tr. Vol.A, 432:8-17, 434:14-435:11).

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Ford's Purpose of Punitive Damages.

Anyway the first thing I want to tell you is I agree with Mr. Hawse, (1) *this is not about compensating the estate of Tommy Smith. This is about determining whether or not Ford should suffer some type of punishment for their conduct.* (2)*The only way you can punish a company or a corporation that I know of is to punish them in a monetary sense.* You have to make them pay. (3) *They are in business to make money. If they have to pay out money for damages and for punitive damages then they will take that into* consideration as part of their business making, *(TIME: 16:51:20) decision making process.* Again it's

not about Tommy Smith. It's about whether or not Ford acted properly.

We again go to the chronology of events in this case. The 1977 F-250 Ford pick-up truck was a 1977, but I believe the testimony was that it was purchased in January of 1978. Fifteen years later it killed Tommy Smith. We know those are facts and those are not in dispute. What happened prior to that, what happened after that? You've got the jury instructions here and I'm going to go over them with you, and tell you what I think the proof is on these jury instructions. (4) *You've got to remember that the purpose of punitive damages is to deter future misconduct by Ford or others like Ford. An award of punitive damages sends out a signal to the industry, (TIME: 16:52:53)* not just to Ford, but to everybody, all the companies look at that.

* * *

Ford knew in the early seventies again they had problems and didn't do anything. Mr. Carr comes here today and says I was responsible for doing the investigation and I determined there was nothing wrong with this vehicle. He still won't admit that these pre-eighty transmissions had a defect in them that was killing and hurting people. He still won't admit that. Even though he comes in and tells you they made changes that reduced this type of rearward and unintended movement, and he talked about the manual valve, rooster comb, the stuff in the transmission, and that's what we said all the time. It's the stuff in the transmission, and you know what he calls it. He says this is not something to correct a defect. He called that (pause) a product improvement. Now, I've heard taxes called revenue enhancers and that sounds better than a tax, but it's the same thing. Product improvement. He still won't admit it. Ford still won't admit it because it would cost them a lot of money to go back and correct this deficiency. They still won't admit it. I submit to you that by your verdict

here today they'll take another look at these cases and maybe they'll do something. (5) *That's the purpose of punishment, to deter this conduct* (TIME: 16:59:32) *in the future, and to deter it as best they can for future injuries or death and destruction. That's the purpose of punitive damages.*

* * *

If you look at the jury instructions it talks about malice. You've got to make a determination first of all as to whether or not the conduct of Ford Motor Company was with flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm, and that's totally your decision, totally within your discretion. (6) *If you make that finding then you've got to determine whether or not you are going to punish Ford* with an aware of compen--, *with an award of punitive damages* in such amount that it will deter future misconduct. That's what you have to determine.

Tape 41-97-VCR-057-A-15, 16:49:40-:51:56, 17:01:53-:02:09.

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Ford's "Flagrant Indifference" and Its Liability for Punitive Damages.

If you look at the jury instructions they talk about flagrant disregard. Flagrant disregard, flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. Flagrant indifference. Let's call a committee and talk about it and forget about it and hope this thing goes away. We will design out the defect starting in 80' and it will go away. *We won't have to worry about those millions and millions of vehicles* (TIME: 16:56:23) *already on the road that*

> *are backing up and running over people and causing death and destruction.* How many of those incidents were reported? More than twenty-three thousand. This is in the 1980 NITSA report. How many people were killed allegedly? In the hundreds. Now, is that not flagrant indifference to the rights of the people on the highway? Purchasers, consumers. It just doesn't have to be the purchaser. If you buy a car you may have children. You may have a wife. You may have grandparents that come and visit. . . . It's designed to protect all the folks is what it is.

Tape 41-97-VCR-057-A-15, 16:55:50-16:57:09 (Tr. Vol. A-1, 33:17-33:3)(emphasis added).

Closing Argument for the Plaintiff, the Estate of Tommy Smith, During the Punitive Damages Phase of the Case, by Rickey Bailey, July 16, 1997, Regarding Plaintiffs' [Respondents'] Counsel Suggestion that $45 Million Would Be Appropriate Award of Punitive Damages

> I would suggest, if you determine that Ford acted with malice, and that's up to you, then you have to determine what amount of money would it take to punish *(TIME: 17:05:36)* Ford? You have to come up with a figure, a figure I would suggest to you is based upon the following: This truck was bought in 1978, fifteen years later, thirteen years after Ford made the changes in 1980, this truck killed Tommy Smith. You have awarded Tommy Smith's estate three million dollars. I would suggest to you that a reasonable figure would be three million dollars times fifteen years or forty-five million dollars. That would be a reasonable figure I would suggest. However, it doesn't matter what I suggest. It's totally up to you. If you determine they acted with malice. You can award one dollar, five hundred million dollars, whatever you want to, and certainly whatever decision you make on

that the plaintiff will accept. That is just a figure that I would suggest to you.

B. Internal Ford Documents Referencing the Number of C-6 Related Accidents and Debate About Whether Design Changes or Other Actions Needed to be Implemented. #1 of 4

Inter Office Communication Product Development Group

December 8, 1971

Mr. A.T. Bryant

cc. J. W. Guterman
H. A. Nickol
O. K. Walthall

Subject: Shift Lever and Transmission Engagement Park to Reverse

The purpose of this letter is to alert you to the increasing number of customer complaint letters pertaining to the transmission control operation and recommend consideration of a design revision. The primary mode of an alleged performance problem occurs when the customer leaves the vehicle with the engine running, thinking he has moved shift lever into "park" position, and the transmission subsequently engages in reverse. We are now receiving approximately six letters per month of this type.

The attached customer letter from Mrs. Leo Applegarth is typical of those received. The conclusion that the "reverse" to "park" detent travel is marginal deserves consideration as the 1972 Cadillac shift travel from "park"

to "reverse" is noticeably greater than that noted on Ford vehicles.

It is requested that any design, tooling and cost implications of an increased travel for "reverse" to "park" detent be established jointly with the Transmission Division for possible incorporation in forward designs.

D.R. Dixon, Principal Engr.
Chassis Safety Engrg. Dept.

Concur: J.L. Martin, Manager

Attachment

#2 of 4

Inter Office Communication Product Development Group

January 13, 1972

Mr. J.W. Guterman

cc A.W. Alexandrowicz
J. L. Martin
O. K. Walthall

Subject: Shift Lever and Transmission Engagement – Park to Reverse

Reference: Mr. D.R. Dixon's Communication of 12-8-71, Same Subject

The purpose of this communication is to inform you of the action being taken on the subject problem. Our investigation of service complaints and complaint vehicles shows that this problem is the result of the customer not placing the shift lever in the detent plate slot for the park position. When the shift lever is not placed in the slot, engine vibration can cause the lever to fall back into the reverse position and result in the car moving rearward.

The basic linkage design is such that we have linkage stretch to insure we always pull the transmission fully into the park detent prior to reaching the slot in the detent plate. To eliminate the condition where the customer does not fully reach the slot in the detent plate, we are investigating two alternate designs. One design which can be incorporated without transmission change is to angle the detent plate between reverse and park and also angle the tang of the shift lever. This will result in

the shift lever always having to climb uphill to slip back into reverse when not fully engaged in the park slot. In addition, the two angular surfaces will automatically hold whereas the present flat surfaces can slip due to engine vibration.

The second approach which would require a transmission revision increases the angular travel between reverse and park. This will give us a larger band to work with and permit us to incorporate a double step on the detent plate to catch the lever if it should not be placed in the slot by the customer.

We plan to have the first proposal formulated into a study package for the Study Committee by 2-1-72. Based on cost and vehicle tryout, we will determine if the first proposal is satisfactory. If this is satisfactory, the second proposal will not be pursued past the layout stage.

A.T. Bryant

#3 of 4

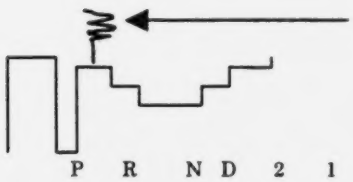
Inter Office Communication Product Development Group

June 30, 1972

Mr. H.A. Nickol
Mr. M.L. Jurosek
Mr. P.D. Fadow
Mr. A.T. Bryant

Subject: Steering Column Transmission Control Detents

Current Chassis shift lever detent design permits transmission lever placement on a "land" between a positive park position and reverse position with the possibility of vehicle vibration moving the lever from park to reverse in an unattended vehicle.



Shift lever-spring loaded against plate in improper position which appears to customer as proper.

Present Condition

Present customer usage patterns indicate that this condition of careless shift lever actuation is occurring frequently in the field with actual high accident incidence.

It is recommended that forward design and development be directed toward a feasible alternative which positively positions shift lever in park or reverse to prevent a false sense of security as to transmission position.

D.R. Dixon, Principal Engineer
Chassis Safety Systems Department

Concurred: J.L. Martin, Manager

#4 of 4

HOTLINE

Transmission Division

Date: November 28, 1972 Code No._____

To: D.C. Hewitt R.W. Smith W.E. Wright C. Tant
W.R. Strandt G.W. Schulz T.P. Monaghan
R.J. Gavin

SUBJECT:

Automatic Transmissions "Jumping Out of Park"

COMMENTS:

The Critical Product Problem Committee has been investigating claims of auto transmissions jumping out of park. The investigation to date has shown all three transmissions (C6, C4, FMX) are involved and the problem is generally across all car lines and does not show any particular trend as to assembly plant, geographical location, time of year, or sex of driver. As a result the Committee has arranged an audit of AAD linkage adjustment setting. Transmission Division is participating (W. Mahler at Los Angeles Pre-Delivery Center-1972). In addition, I have requested Livonia, Fairfax, and Sharonville to audit their mechanism checks and submit a report by Dec. 4, 1972. In the last 2 weeks' meeting, 6 additional cases have been reported.

FMX	1972 Ford	11,000 miles	"Jumped out of park"
C4	1972 Torino	8,972 miles	"Came out of park"
C4	1972 Montego	2,675 miles	"Came out of park hit tree"
C6	1972 Ford	10,900 miles	"Jumped out of park into reverse"
C6	1971 Ford	20,074 miles	"Jumped out of park into reverse"
C6	1969 Mercury	40,400 miles	"Jumped out of park into reverse"

Closed ف Next Reporting Date __ Signature B. Stapleton

C. SAE "Recommend[ation]" Regarding Providing a "Standard Pattern or Sequence for . . . Automatic Transmissions"

AUTOMATIC TRANSMISSIONS — MANUAL CONTROL SEQUENCE — SAE J915
SAE Recommended Practice

Report of Transmission and Drivetrain Committee approved July 1963.

Purpose and Scope The purpose of this SAE Recommended Practice is to provide a standard pattern or sequence for the manual control of automatic transmissions in passenger cars or light duty trucks.

This recommendation pertains particularly to automatic transmission of the hydrodynamic drive type. However, it could serve equally well for other types, such as mechanical, electrical or hydrostatic. It is primarily applicable to passenger cars and light duty trucks; but if applicable, it could be used on other vehicles.

Steering Column Mounted Control Lever The general pattern or sequence shall be:

P R N D L

where the letters stand for Park, Reverse, Neutral, Drive, and Low, respectively.

The Park position shall be located as shown when provided; however, inclusion of such position is optional.

For detecting the positions by feel and for safety a stepped gate shall be provided, such that the control lever must be raised in a direction parallel to the axis of the steering column in order to engage certain of the manual positions. While a definite gating pattern is not specified, a preferred one is as follows:

N and D on one plane: raise to obtain either R or L, and, if a Park position is included in shifting R to P, a further rise with P being a latched position.

Floor or Panel Mounted Control Lever The general pattern or sequence shall be:

P R N D L

Adequate gating as mentioned under "Column Mounted Lever" should be provided. A level with a button release for entering Reverse, Park, and/or Low is a desirable feature. Park should be a latched position but its inclusion is optional.

Push Button Manual Control Arrangement There is no preferred pattern. A recommendation is made that the N and R buttons be well defined and separated from the buttons selecting forward speeds.

Variations If differences such as dual driving range selection or the choice of specific ratios are provided, then these can fit into the recommended sequence. For example:

P R N D_2 D_1 L	P R N D 2 1
P R N DRIVE L	PARK R N D S L

Inhibitors For three speed automatic gear boxes, the inhibiting of a 3-1 shift is recommended above vehicle speeds which would cause engine over-speed and/or severe braking. No recommendation is made on a 3-2 inhibitor. Either mechanical or hydraulic inhibiting is acceptable and recommended for all types of controls.

Engaging of the Parking position (if included) is mechanically inhibited by means of the gating mentioned above. Further, if Park position is engaged with vehicle moving, the mechanism must ratchet or not engage until a low (0-5 mph) vehicle speed is attained.

Neutral Safety Switch A switch in series with the starter circuit is recommended to prevent the starting of the engine in any driving position. This switch should allow the engine to be started only in the N and P (if included) positions.

D. Affidavit of Robert G. Grant, Memorandum in Support of Ford Motor Company For Judgment Notwithstanding the Verdict, or Alternatively, For a New Trial, Clay Circuit Court Civil Action No. 94-CI-00167 (July 28, 1997), Regarding How Often Ford Prevailed in C-6 Related Cases Tried to a Verdict.

COMMONWEALTH OF KENTUCKY
CLAY CIRCUIT COURT
CIVIL ACTION NO. 94-CI-00167

ESTATE OF TOMMY SMITH, ET AL. PLAINTIFFS

VS.

FORD MOTOR COMPANY DEFENDANT and THIRD-PARTY PLAINTIFF

VS.

SAND HILL ENERGY, INC. THIRD-PARTY PLAINTIFF

AFFIDAVIT OF ROBERT G. GRANT

Robert G. Grant, being duly sworn, hereby deposes and says:

1. I am attorney licensed to practice law in the states of Michigan, New York, and California. Since December 1980, I have been employed by Ford Motor Company ("Ford") as an attorney in its product litigation group.

2. From December 1980 until the present, I have been one of the attorneys responsible for managing product litigation involving allegations that Ford transmission control systems are defectively designed because of the potential for misshifting and subsequent inadvertent vehicle movement. In this affidavit, I will refer to this litigation as "transmission litigation" or "transmission cases."

3. After I became responsible for transmission litigation in December 1980, I familiarized myself with the results in the transmission cases that Ford had tried before that date. Further, I am personally familiar with the results in transmission litigation after December 1980.

4. Ford has prevailed in more than 74% of the transmission cases it has tried since 1977 involving vehicles with C6, C4, and FMX transmissions. In these cases, juries in Arkansas, California, Florida, Iowa, Louisiana, Michigan, Mississippi, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas have all returned verdicts in favor of Ford. Half of these cases involved vehicles with C6 transmissions, the same type of transmission at issue in the present case. In many of these cases, juries returned special verdicts expressly finding that the vehicles involved were not defective.

/s/_____
Robert G. Grant

Subscribed to and sworn before me

This ___day of July, 1997

FRANCES MARY KLEABIR

Notary Public
Notary Public, Wayne County, Michigan
My Commission Expires December 17, 1998

E. Relevant Excerpt of Ford's 1985 10-K Report to the SEC

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.
20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1984
Commission file number 1-3950

FORD MOTOR COMPANY
(Exact name of registrant as specified in its charter)

Delaware	38-0549190
(State of incorporation)	(I.R.S. Employer Identification No.)

The American Road, Dearborn, Michigan	48121
(Address of principal executive offices)	(Zip Code)

Registrant's telephone number, including area code 313-322-3000

* * *

Item 3. Legal Proceedings

Product Matters

In addition to the case involving allegedly defective automatic transmissions specifically described above, Ford is a defendant in various other cases alleging the Ford's design of automatic transmissions and/or their shift selector mechanisms permit vehicles to move after being placed in park. The damages specified by the plaintiffs in the complaints in these additional actions,

including both actual and punitive damages, aggregated approximately $1.6 billion at February 6, 1985. (In some of the foregoing actions no dollar amount of damages is specified or the specific amount referred to is only the jurisdictional minimum.) In addition to the pending actions, accidents have occurred and claims have arisen which also may result in lawsuits involving these vehicles.

F. Settlements and Awards Involving C-6 Related Park to Reverse Defect

S=Settlement; V=Verdict

$4,400,000	V	*Nowak v. Ford Motor Co.*, 638 S.W.2d 582 (Tex. Ct. App. 1982) ($400,000 pecuniary; $4,000,000 punitive).
$1,255,000	V	*Ford Motor Co. v. Burdeshaw*, 661 So. 2d 236 (Ala. 1995).
$ 250,000	V	*Lenhardt v. Ford Motor Co.*, No. C80-1835 (W.D. Wash. 1980).
$ 800,000	S	*Thornberry v. Ford Motor Co.*, No. 79C1-3350 (Ky. Cir. Ct. Fayette Co. 1979).
$ 789,000	S	*Skipper v. Ford Motor Co.*, No. 786399 (S.D. Fla. 1978) (present value in 1983).
$ 514,000	S	*Grider v. Ford Motor Co.*, No. 269685 (Cal. Super. Ct. 1977).
$ 500,000	S	*Moore v. Ford Motor Co.*, No. 79-3022 (Fla. Cir. Ct. Polk Co. 1979).
$ 488,000	S	*Heather v. Ford Motor Co.*, No. 79-L-6 (Ill. Cir. Ct. Madison 1979).
$ 400,000	S	*Chapman v. Ford Motor Co.*, No. 793090 (D. W. Va. 1979).
$ 350,000	S	*Fager v. Ford Motor Co.*, No. 794021 (E.D. Ill. 1979).
$ 300,000	S	*Sanches v. Ford Motor Co.*, No. CA 3790917F (N.D. Tex. 1979).
$ 225,000	S	*Look v. Ford Motor Co.*, No. 80-125-0RL (D. Fla. 1980).
$ 150,000	S	*Miller v. Ford Motor Co.*, No. 79CV-8597 (Colo. D. Ct. Denver Co. 1979).
$ 115,000	S	*Morley v. Ford Motor Co.*, No. 780402 (D. Utah 1978).
$ 105,000	S	*Compton v. Ford Motor Co.*, No. 7826333 (Tex. D. Ct. Nueces Co. 1978).

$ 104,500	S	*Downey v. Ford Motor Co.*, No. 81-4108 (D. Kan. 1981).
$ 100,000	S	*Barker v. Ford Motor Co.*, No. 79-935420 (Mich. Cir. Ct. Wayne Co. 1979).
$ 97,500	S	*Sweat v. Ford Motor Co.*, No. 80 SP25 ((S.C. Common Pleas Hampton 1980).
$ 85,000	S	*Lehman v. Ford Motor Co.*, No. 798001 (Fla. Cir. Ct. Broward Co. 1979).
$ 75,000	S	*Hughes v. Ford Motor Co.*, No. CA 19753 (N.D. Tex. (Abilene) 1979).
$ 75,000	S	*Smith v. Ford Motor Co.*, No. 791333 (D. Ga. 1979).
$ 70,000	S	*Selle v. Ford Motor Co.*, No. 7925C1 (D. Fla. 1979).
$ 60,000	S	*Ulmer v. Ford Motor Co.*, No. 78-818-299 (Mich. Cir. Ct. Wayne Co. 1978).
$ 55,000	S	*Harrington v. Ford Motor Co.*, No. CIVS 80199 (E.D. Cal. 1980).
$ 55,000	S	*Nedimyer v. Ford Motor Co.*, No. 794406 (W.D. Penn. 1979).

G. Jury Instructions in *Ford v. Smith* and *Pacific Mut. Life Ins. Co. v. Haslip*

Jury Instructions in *Ford v. Smith*

If you are further satisfied from the evidence that Ford Motor Company acted toward Tommy Smith with malice, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages you have already awarded. The plaintiff must prove malice with clear and convincing evidence, and you may consider the evidence introduced in the first phase of this trial as well as the second phase of this trial.

As used in this instruction:

(a) "Malice" means either conduct which is specifically intended by Ford Motor Company to cause tangible or intangible injury to the plaintiff or

(b) Conduct that is carried out by Ford Motor Company both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

If you award punitive damages in determining the amount thereof, you should consider the following factors.

(a) The likelihood that at the relevant time that serious harm would arise from Ford Motor Company's misconduct;

(b) The degree of Ford Motor Company's awareness of that likelihood;

(c) The profitability of the misconduct to Ford Motor Company;

(d) The duration of the misconduct and any concealment of it by Ford Motor Company;

(e) Any actions by Ford Motor Company to remedy the misconduct once it became known to Ford Motor Company.

Jury Instruction in *Pacific Mut. Life Ins. Co. v. Haslip*

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [*sic*] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

499 U.S. 1, 6 n.1 (1991).